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IN THE

Supreme Court of the United States

October Term, 1967

No. 701

In the Matter of

BUDDY LYNN WHITTINGTON

On Writ of Certiorari to the Court of Appeals of Ohio, Fairfield County

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, AS *AMICUS CURIAE*

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Interest of the *Amicus*

The Legal Aid Society of New York is a non-profit charitable corporation chartered by the State of New York to furnish legal assistance to persons unable to retain counsel.

Pursuant to New York's Family Court Act of 1962, the Society's attorneys are assigned as "law guardians" to represent all otherwise unrepresented juvenile respondents in delinquency proceedings in the Family Court of the City of New York.

The attorneys for the parties have consented to the filing of this brief.

Introduction

Although the arguments advanced herein are directed only to the burden of proof aspect of the case now before this Court, our position with respect to that issue reflects our considered and unreserved commitment to the proposition that in the adjudicatory phase of a delinquency proceeding a child charged with criminal conduct is entitled to all procedural and substantive safeguards generally applicable to the criminal truth finding process together with such additional rules as may be uniquely applicable to the juvenile process. In addition, the accused is entitled to those constitutional protections generally associated with criminal proceedings which, although not essential to the truth finding process, reflect an overriding social policy.

In passing we note that although much has been said and written about the rights of the child, and of the state as *parens patriae,* little consideration has been given to the rights of interested and devoted natural parents. Their rights to the custody and companionship of their children also ride upon vicissitudes of the burden of proof. See, *Armstrong* v. *Manzo,* 380 U. S. 545 (1965).

POINT I

The reasonable doubt standard is applicable to the adjudicative phase of a delinquency proceeding by virtue of the due process and equal protection clauses of the Fourteenth Amendment.

Although the phrase "beyond a reasonable doubt" is of relatively recent origin, it is the modern articulation of the oldest and most profound concept in common law jurisprudence. The phrase is the law's sophisticated refinement of society's determination that only the guilty shall be subjected to the loss of liberty. Sometimes expressed in terms that it is better to free a number of guilty persons rather than convict ~~one~~ innocent,* the essence of the concept relates to the quality of proof or degree of certainty necessary to overcome ". . . the overriding presumption of innocence with which the law endows the accused." *Morisette* v. *United States,* 342 U. S. 246, at 275 (1952).**

This need for certainty prior to the imposition of penal sanctions† can be traced back as far in history as one cares to go.

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* II Hale, *Pleas of the Crown* 290; IX Holdsworth, History of the English Law 224 (1925).

** The presumption of innocence is regarded by some writers as a corollary of proof beyond a reasonable doubt. See, Wigmore, *Evidence,* §2511 (3d ed.); III Greenleaf, *Evidence,* §29 (8th ed., 1868). Since the presumption of innocence is not an evidentiary presumption, its value is dependent solely upon and fluctuates with the degree of proof necessary to overcome it. *See,* Ohio Rev. Code Ann. §2945.04 which ties reasonable doubt with the presumption of innocence.

† A penal sanction need not be punitive in order to be penal. Rehabilitation commitments are just as much part of the penal process as are punitive sentences. *Specht* v. *Patterson,* 386 U. S. 605 (1967); *United States* v. *Brown,* 381 U. S. 437, 458 (1965).

Clause 36 of the Magna Charta states the right to a trial under the highest standard of proof known to medieval man. By ordeal or by battle, an accused could call upon the infallible judgment of God acting thorough His chosen instrumentalities and "Providence was deemed to have determined in favor of truth . . ." IV Blackstone Commentaries *348.

While we know of no reasonable doubt charge given to the early English jurys, the role of the oath served to impose a Divine standard upon both jurors and witnesses.* Jurors would take an oath to perform their duties faithfully and believed God would punish them if they did not.

When witnesses testified, their oath would insure the truthfulness of their testimony. IX Holdsworth, History of the English Law, 225, 231 (1925).**

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* A perhaps somewhat more effective reasonable doubt standard was that enforced by King Alfred, who in one year is reported to have hanged 44 judges for having rendered "incorrect" verdicts in capital cases. III Greenleaf, *Evidence,* §29, p. 29 (8th ed., 1868). While we do not know what standard of proof these unfortunate jurists applied, one can safely assume that their successors applied one calling for a considerable higher degree of certainty. Greenleaf also traces the higher criminal standards back to its Biblical and Greco-Roman origins.

** A typical sixteenth century jury direction illustrates this:

> "Good men . . . have an eye to your oath and to your dutie and do that which God shall put in your mindes to the discharge of your consciences, and marke well what is said"

Sir Thomas Smith, *De Republica Angelorum,* Bk II, ch. 23, quoted in Holdsworth, *supra,* at 226.

Greenleaf points out that the common law oath of jurors in criminal cases was in markedly different form than that taken in civil cases and finds in the oath of the criminal juror to "true deliverance make" a standard of certainty not required by the oath of a civil juror. III Greenleaf, *Evidence supra,* §29.

And it was need for certainty in criminal verdicts which was used as the basis for refusing counsel to the accused in criminal trials—

> ". . . because the evidence to convict a prisoner should be so manifest as it could not be contradicted."

III Coke, *Institutes,* 29, 137 (1797)

This standard is so ingrained in the common law that it is universally accepted as a fundamental part of our legal process.

Had the Petitioner been charged with a crime and tried in the criminal courts of Ohio, he would have been tried under a standard of proof requiring that his commission of the criminal act be established beyond a reasonable doubt. By classifying Petitioner as "juvenile" rather than "adult" the State seeks to withdraw the procedural rights generally available to persons charged with the commission of criminal acts and in so doing has effectively removed the presumption of innocence from juvenile offenders. While the classification of offenders as juvenile and adult can be assumed to be a reasonable classification for some purposes, it does not follow that the classification has legal significance when invoked in a manner having no relevance to the purpose for which the classification was made. *Baxstrom* v. *Herold,* 383 U. S. 107 (1966); *Walters* v. *City of St. Louis,* 347 U. S. 231 (1954).

The juvenile-adult distinction is totally without legal significance when sought to be applied to the standards of proof in the adjudicatory phase of a delinquency proceeding. We can conceive of no argument—nor has one ever

been urged—which in any way justifies a factual determination of criminal juvenile conduct under a standard of proof less than reasonable doubt.

The reasonable doubt standard is one which not only has stood the test of time but is one which has been accepted as the only test in both federal and state prosecutions. Its rejection in juvenile proceedings rests upon the irrelevant and inaccurate notion that incarceration of a juvenile for purposes of rehabilitation does not require the care or certainty that is required for the incarceration of an adult. Even assuming the basic premise that incarceration for rehabilitation is a benevolence, this case proves the wisdom of Justice Brandeis' observation that,

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient" *

Conclusion

For the foregoing reasons the judgment of the Court of Appeals of Ohio should be reversed and the case remanded with directions to vacate the judgment of the Juvenile Court of Fairfield County.

Respectfully submitted,

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* *Olmstead* v. *United States*, 277 U. S. 438, at 479 (1928) (dissenting opinion).